MCNAIR LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

www.mcnair.net

BANK OF AMERICA TOWER
1301 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

POST OFFICE BOX 11390
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803)799-9800
FACSIMILE (803) 376-2219

April 30, 2004

The Honorable Bruce F. Duke
Executive Director
South Carolina Public Service Commission
Synergy Business Park
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Petition of Verizon South Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in South Carolina Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, and the Triennial Review Order
Docket No. 2004-0049-C

Dear Mr. Duke:

I am writing on behalf of HTC Communications to respond to Verizon's letter dated April 20, 2004. Verizon's letter proposes a procedural schedule for addressing the non-pricing issues in the above-referenced matter, and proposes that the pricing issues be litigated at a "slightly later phase" and that, in the interim, Verizon would charge rates of its own choosing. The Commission should reject Verizon's schedule and pricing proposal, because both violate the letter and spirit of the law, including prior Commission orders. In addition, Verizon's proposal to impose a new schedule of rates must be immediately rejected as an improper attempt to unilaterally modify the terms of the parties' individual interconnection agreements.

Verizon notes that its proposed schedule would allow the Commission to issue a final order "reasonably near the July 2 due date established in the TRO." As argued in the Motion to Dismiss filed by the Small CLEC Group[1] on March 12, 2004 in this docket (copy attached hereto), which has been held in abeyance by the Commission, there is no such "due date" because the Triennial Review Order ("TRO")[2] was vacated by the Court of Appeals for the D.C.

[1] HTC Communications, Inc. is a member of the Small CLEC Group.

[2] Report and Order and Order on Remand Until Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "TRO"), *vacated in part, remanded in part, and vacatur temporarily stayed, United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. March 2, 2004).

Circuit. See United States Telecom Ass'n v. FCC ("USTA"), No. 00-1012 (D.C.Cir., March 2, 2004). Although the Court of Appeals stayed its own vacatur of the TRO, this was done on a temporary basis only to allow the Federal Communications Commission ("FCC") to appeal the Court's opinion. Other states have decided not to move forward with similar consolidated arbitration petitions filed by Verizon. See NCUC Order dated March 2, 2004 in Docket No. P-19, Sub 477; Letter dated March 15, 2004 from Maryland Public Service Commission rejecting Verizon's petition for arbitration. Even if the Commission decides to move forward in South Carolina, despite the unsettled state of the law surrounding the TRO, the Commission is not bound by the July 2 "due date" suggested by the TRO. This is especially true in light of the fact that Verizon filed an updated arbitration petition on March 19, 2004, to take into account changes to the TRO occasioned by the Court of Appeals' decision. It is simply unreasonable to expect that all of the carriers with whom Verizon seeks arbitration can effectively make any progress to resolve these issues within the time frame proposed by Verizon, especially when the underlying law is changing and subject to further change. Thus, Verizon's proposed schedule violates the spirit of Section 252 of the Telecommunications Act of 1996 by precluding effective negotiations prior to arbitration.

Furthermore, Verizon's proposed schedule does not provide an opportunity for CLECs to be heard before the Commission on non-pricing issues. The complexity of the proceeding and the sheer number of CLECs and CMRS providers also hinders effective negotiation. Each CLEC faces the real possibility that, with the limited amount of time scheduled for resolution of the issues, issues of importance to that CLEC will be lost in the shuffle. Consolidation is appropriate when it will reduce the administrative burdens on telecommunications carriers, other parties to the proceedings, and the state commission. See 47 U.S.C. § 252(g). While consolidation may be helpful in this case, it must be done in such a way that the rights of the individual parties to have their issues fully addressed and fairly resolved are preserved. To this end, Verizon's proposed schedule should be rejected, because it does not allow adequate time for the parties to work individually toward resolution of the issues, nor does it allow adequate time for the Commission to fully and adequately address all issues raised.

Most importantly, Verizon's proposal to charge rates of its own choosing while continuing to stonewall CLECs who have sought cost back-up for Verizon's rates for years must be rejected. Verizon's proposal would effectively supersede many of the individually negotiated and arbitrated rates the Commission has approved in numerous filings and proceedings since 1996. The proposal would reward Verizon for its refusal to provide cost-based rates to CLECs, in direct violation of the mandates of the Telecommunications Act of 1996, and would give Verizon free reign to charge whatever rates it pleases. Not only is this a violation of applicable law and Commission orders, it almost certainly violates the terms of each and every interconnection agreement that has been individually negotiated with Verizon over the past eight years. This simply cannot be allowed. The Commission must reject Verizon's pricing proposal and leave in effect all existing agreements and Commission-ordered rates until such time as

Verizon has demonstrated and proved different cost-based rates in accordance with applicable law.

In summary, we urge the Commission to rule on the Small CLEC Group's motion to dismiss and follow other states that have declined to address similar Verizon petitions for consolidated arbitration. Failing that, the Commission must reject Verizon's proposal to charge interim rates of its own choosing; and should also reject Verizon's procedural schedule, because the schedule is unfair to CLECs and does not provide adequate time and opportunity to resolve important issues.

In the event the Commission determines that it will proceed with this arbitration, we respectfully submit that the following schedule is appropriate and would permit the parties sufficient time to address and attempt to resolve the issues raised:

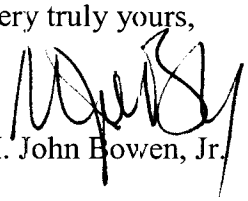
> March 19, 2004 – Request for negotiations deemed to have been received upon filing of Verizon's Updated Petition for Consolidated Arbitration.
>
> December 19, 2004 – Commission's deadline for finally resolving the issues in this proceeding.
>
> The parties have already filed the required petition and responses. Pursuant to Section 252(b)(4)(A), the Commission's consideration of the petition is limited to the issues raised in the petition and any response thereto.
>
> The Commission should issue a scheduling order for testimony, hearings, and briefs that will allow it to meet the December 19, 2004 due date.

Finally, with respect to pricing issues, regardless of whether or not the Commission moves forward with Verizon's proposed schedule for non-pricing issues, the Commission must leave current pricing in place until such time as Verizon has demonstrated and proved different cost-based rates in accordance with applicable law, in an appropriate proceeding before the Commission, as required by the federal Telecommunications Act of 1996, FCC rules, and prior Commission orders. Verizon's proposal to impose a new schedule of rates must be immediately rejected as an improper attempt to unilaterally modify the terms of the parties' individual interconnection agreements.

Please have one copy of this filing clocked in and returned with our courier.

Thank you for your assistance.

Very truly yours,



M. John Bowen, Jr.

Enclosures

cc: Steven W. Hamm

BEFORE THE

PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-0049-C

IN RE:	)
Petition of Verizon South Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in South Carolina Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	)

MOTION TO DISMISS PETITION FOR ARBITRATION

Fairfield Communications, FTC Diversified Services, Inc., HTC Communications, Inc., PRTCommunications, LLC, and West Carolina Communications, LLC ("Small CLEC Group") respectfully request that the Public Service Commission of South Carolina ("Commission") dismiss without prejudice the Petition for Arbitration filed by Verizon South Inc. ("Verizon"). Alternatively, the Small CLEC Group asks that the Commission delay any proceedings with respect to the Petition for Arbitration until such time as the parties and the Commission have a clear direction as to the legal status of the *Triennial Review Order*[1] issued by the Federal Communications Commission ("FCC").

In its Petition, Verizon asks the Public Service Commission of South Carolina ("Commission") to initiate a consolidated arbitration proceeding to amend the interconnection

[1] Report and Order and Order on Remand Until Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "TRO"), *vacated in part, remanded in part, and vacatur temporarily stayed, United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. March 2, 2004).

agreements between Verizon and each of the companies listed in Verizon's Exhibit 1, including each of the companies in the Small CLEC Group, to implement changes that Verizon asserts are warranted in light of the FCC's *Triennial Review Order*. For the reasons stated herein, the members of the Small CLEC Group respectfully request that the Commission dismiss Verizon's Petition for Arbitration because the issues decided in the *Triennial Review Order* are subject to vacatur and substantial change in the near future, and because of procedural deficiencies with the Petition for Arbitration, as discussed below.

1. **Verizon's Petition for Arbitration Is Premature Because of the Uncertainty Surrounding the Status of the FCC's Determinations in the *Triennial Review Order*.**

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit remanded a portion and vacated major portions of the *Triennial Review Order*. *United States Telecom Ass'n v. FCC ("USTA")*, No. 00-1012 (D.C.Cir., March 2, 2004). In doing so, the Court called into question the fundamental basis of the TRO, noting the FCC's "failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *USTA* at p. 62. While the Court stayed its own vacatur, the stay was issued on a temporary basis only in order to enable the FCC to request rehearing.[2] If the FCC fails to bring an appeal, or brings an appeal and is not successful in obtaining a more permanent stay of the appellate court's decision, major parts of the *Triennial Review Order* will be vacated. It is in the interest of administrative efficiency to hold off on arbitrating the issues involved in this matter until the status of the FCC rules upon which Verizon relies is clear.[3] Verizon's approach seems to be that the Commission should

[2] The Court temporarily stayed the vacatur (*i.e.*, delayed issue of the mandate) "until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from [March 2, 2004]." *USTA* at p. 62.
[3] Verizon acknowledges it is likely that, before the conclusion of this arbitration, a decision will be issued that will modify the legal requirements established in the TRO. In fact, that has already happened, although the decision has

resolve all of the issues, and if some of them are ultimately resolved otherwise by the courts, those portions of the amendment can be voided. See Petition for Arbitration at p. 7. A better – and more efficient – approach is for the Commission to wait to make a determination on these issues until it is clear that they are indeed in controversy. This is especially true in light of the fact that at least the D.C. Circuit Court of Appeals believes that major portions of the *Triennial Review Order* should and will be vacated.

The North Carolina Utilities Commission ('NCUC") recently continued indefinitely any proceedings on a similar petition filed by Verizon in that state. The NCUC concluded that good cause existed to continue the proceedings, because the "consolidated arbitration" requested by Verizon would be "a waste of everyone's time" in that it "approximates a parallel TRO proceeding." NCUC Order dated March 2, 2004 in Docket No. P-19, Sub 477 ("NCUC Order"), attached hereto as Exhibit A.[4] The NCUC noted this was especially true in light of Verizon's position that it would not actively participate in the TRO dockets in North Carolina, but that it reserved "its right to challenge these determinations at a later time," and that it believed "the FCC's TRO rules were 'in direct conflict with the 1996 Telecommunications Act.'" NCUC Order at p. 2, quoting a letter filed by Verizon with the NCUC on October 31, 2003. Verizon has taken the same position with respect to TRO proceedings in South Carolina. See Letter from Stan Bugner to Bruce F. Duke dated December 15, 2003 in SCPSC Docket Nos. 2003-326-C and 2003-327-C, attached hereto as

---

been temporarily stayed. Nonetheless, Verizon states it is relying on the specific procedures set forth by the FCC in the TRO in filing this petition. See Petition for Arbitration at p. 5. However, the FCC cannot override or preempt the law or judicial process. Verizon is, in effect, seems to be arguing that the appellate court reviewing the FCC's decision does not have the right to vacate or stay the FCC's order.

[4] On March 4, 2004, the NCUC called for comments on whether to continue or hold in abeyance its state TRO proceedings until all petitions for rehearing and all appeals have been exhausted. See Order Allowing for Comments in NCUC Docket Nos. P-100, Sub 133q and P-100, Sub 133s. Regardless of whether a state determines to conduct TRO proceedings (most likely without delegated authority, but simply to build a record of competition in the state), Verizon's Petition for Arbitration should be dismissed.

Exhibit B. The NCUC also noted that "the FCC rules are under challenge on many fronts" and that it "makes no sense to begin an arbitration where the underlying rules may be changed in midstream." Id. This is even more true now that the D.C. Circuit Court of Appeals has decided that substantial portions of those rules should be vacated.[5]

It should also be noted that Verizon in another proceeding has taken a similar position to that taken by the Small CLEC Group here. HTC Communications has attempted for years to require Verizon to demonstrate that the rates it charges for unbundled network elements ("UNEs") are cost-based. While existing FCC rules require such a demonstration and further require Verizon to demonstrate those costs based on a Total Element Long Run Incremental Cost ("TELRIC") methodology, Verizon has used the fact that the FCC intends to revisit the TELRIC rules as a reason to further delay its obligation to provide cost-based rates by requesting an indefinite delay of the Commission's proceeding to set cost-based UNE rates for Verizon. See Verizon Motion to Delay and Alter Current Schedule dated December 11, 2003 in SCPSC Docket No. 2002-338-C.

2. The Members of the Small CLEC Group Were Not Afforded an Adequate Opportunity to Negotiate with Verizon Regarding the Proposed Amendment, as Contemplated by the Telecommunications Act.

The members of the Small CLEC Group have not had an adequate opportunity to negotiate with Verizon regarding the proposed amendment. The uncertainty surrounding the *Triennial Review Order* is probably one reason that many of the CLECs have not responded with specificity to Verizon's request to negotiate amendments to existing interconnection agreements. Verizon has done little to attempt to "negotiate" this amendment other than to notify the companies that its proposal is available on its website. HTC Communications, for

[5] While the D.C. Circuit Court's decision was filed on March 2, 2004, and the NCUC Order was issued on March 3, 2004, it is likely that the NCUC Order was drafted and issued without knowledge of the appellate decision, as it was

example, did not receive the October 2, 2003 letter referred to by Verizon and attached as Exhibit 3 to its Petition. When Verizon presented the proposed amendment to an HTC Communications employee in November 2003, the employee was told that negotiation of the amendment was not a priority, and that other ongoing interconnection agreement issues should first be resolved. The unrelated issues have still to be resolved, and HTC Communications and Verizon have not yet finalized an interconnection agreement.

3. Requiring Members of the Small CLEC Group to Negotiate an Amendment to an Agreement in the Absence of an Underlying Negotiated Agreement Is Putting the Cart Before the Horse.

HTC Communications and Verizon have yet to resolve and execute a final interconnection agreement, despite years of negotiations and arbitration. Likewise, FTC Diversified Services does not have an interconnection agreement with Verizon. Requiring CLECs who have not yet reached an agreement on terms for an overall interconnection agreement with Verizon to negotiate an amendment to that non-existing agreement is putting the cart before the horse.

The other three CLECs in the Small CLEC Group have opted into interconnection agreements that Verizon has entered into with other carriers. It simply does not make sense to require these three CLECs to negotiate amendments to those agreements.

---

not mentioned in the NCUC Order and, in fact, the NCUC noted the pendency of the appeals.

4. Verizon's Petition Suffers from Procedural Deficiencies that Warrant Dismissal.

Verizon relies on the procedures set forth in the Communications Act of 1934, as amended, in filing its Petition. Assuming those procedures are even controlling here,[6] Verizon has failed to comply with them.

First, Verizon did not clearly set forth its intent to begin negotiations on its proposed amendment. In fact, as discussed above, in some cases there is no underlying interconnection agreement to amend. Second, Section 252(b) provides only for arbitration with respect to requests for negotiation *received by* an incumbent local exchange carrier. See 47 U.S.C. § 252(b)(1). The procedures of Section 252(b) are not, by its own terms, triggered by a request *from* an incumbent local exchange carrier like Verizon. Third, Verizon did not provide a copy of the Petition to all members of the Small CLEC Group on the same day it provided a copy to the Commission. Section 252(b)(2)(B) specifically requires that a party petitioning a state commission "shall provide a copy of the petition and any documentation to the other party or parties *not later than the day on which the State commission receives the petition*." The Petition was filed with the Commission on February 20, 2004, but was apparently mailed to the members of the Small CLEC Group. HTC Communications, for example, received a copy of the Petition on February 24, 2004, and PRTCommunications received a copy of the Petition on February 23, 2004.

WHEREFORE, for the reasons set forth above, the members of the Small CLEC Group respectfully request that the Public Service Commission of South Carolina dismiss without

[6] As stated in ¶ 703 of the *Triennial Review Order*, the FCC required use of the time frames set forth in Section 252(b) as a default only where individual interconnection agreements are silent concerning change of law and/or transition timing.

prejudice the Petition for Arbitration filed by Verizon South Inc. Alternatively, the Small CLEC Group asks that the Commission delay any proceedings with respect to the Petition for Arbitration until such time as the parties and the Commission have a clear direction as to the legal status of the FCC's *Triennial Review Order*.

Respectfully Submitted,

FAIRFIELD COMMUNICATIONS
FTC DIVERSIFIED SERVICES, INC.
HTC COMMUNICATIONS, INC.
PRTCOMMUNICATIONS, LLC
WEST CAROLINA COMMUNICATIONS, LLC

By: _____

M. John Bowen, Esquire
Margaret M. Fox, Esquire
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Telephone: (803) 799-9800
Facsimile: (803) 376-2219
E-mail: jbowen@mcnair.net;
pfox@mcnair.net

Stephen G. Kraskin
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
Telephone: (202) 296-8890
Facsimile: (202) 296-8893

Their Attorneys

March 12, 2004
Columbia, South Carolina

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-19, SUB 477

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	ORDER CONTINUING PROCEEDING INDEFINITELY

BY THE COMMISSION: On February 20, 2004, Verizon South, Inc. filed for arbitration "of an Amendment to Interconnection Agreements with Competing Local Providers [CLPs] and Commercial Mobile Radio Service Providers [CMRS providers] in North Carolina" pursuant to Section 252 of the Telecommunications Act and the *Triennial Review Order* (TRO). As such, this consolidated arbitration petition involves nearly 70 CLPs and CMRS providers. Verizon is proposing an amendment to its interconnection agreements implementing changes in its network unbundling obligations pursuant to the TRO. More particularly, the petition was filed pursuant to the transition process that the FCC established in the TRO in Paragraphs 700 through 706. For the purposes herein, the term "CLPs" refers to both CLPs and CMRS providers.

Verizon explained that the FCC had provided that incumbent local exchange companies (ILECs) and CLPs must use the Section 252(b) "timetable for modification" of agreements; and, for the purposes of the negotiation and arbitration timetable, "negotiations [are] deemed to commence on the effective date" of the TRO, which was October 2, 2003. Verizon said the negotiations between itself and the CLPs in fact commenced on that date, because on October 2, 2003, Verizon sent a letter to each CLP initiating negotiations and proposing a draft amendment to implement the FCC's rules. This means that the window for requests for arbitration is from February 14, 2004, to March 11, 2004. A ruling would need to be made by the Commission on or about July 2, 2004.

Verizon reported that, since the October 2, 2003 notice, some CLPs have signed Verizon's draft amendment, without substantive changes; but, of the remaining CLPs in North Carolina, virtually none provided a timely response to Verizon. The majority of substantive responses have come in only lately. Some responses constitute a virtual wholesale rejection of the amendment.

Verizon, of course, noted the pendency of appeals before the D.C. Circuit and the other filings for reconsideration pending before the FCC. Verizon is filing this petition now, based on current federal law.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to continue this proceeding indefinitely pending further order and advise Verizon that it may avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC.

The reasons for these recommendations are several-fold:

First, the changes sought by Verizon appear to be of similar subject matter to those which are subject to the Commission's TRO proceeding. As such, this "consolidated arbitration" approximates a parallel TRO proceeding. This is a waste of everybody's time. It is especially so since Verizon informed this Commission on Halloween Day, 2003 that it would not actively participate in the TRO dockets, while reserving "its right to challenge these determinations at a later time." It also stated its belief that the FCC's TRO rules were "in direct conflict with the 1996 Telecommunications Act." This is strange considering that Verizon purports to desire the swift implementation of the FCC's rules in the context of its arbitration petition. The Commission does not have the resources or the inclination to conduct *two* TRO proceedings simultaneously.

Second, as alluded to by Verizon in its filing, the FCC rules are under challenge on many fronts. It makes no sense to begin an arbitration where the underlying rules may be changed in midstream.

Third, Verizon did not comply with the Commission's arbitration procedural rules. It did not include prefiled testimony or seek waiver of same. It included no matrix summary. The petition did not appear to be signed by North Carolina counsel as required by our rules.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of March, 2004.

NORTH CAROLINA UTILITES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl030104.01

EXHIBIT B

Regulatory and Governmental Affairs

verizon

Verizon Communications
Bank of America Tower
1301 Gervais Street, Suite 825
Columbia, SC 29201

Phone 803.254.5736
Fax 803.254.9626

December 15. 2003

Mr. Bruce F. Duke
Deputy Executive Director
South Carolina Public Service Commission
P.O. Drawer 11649
Columbia, South Carolina 29211

Re: Docket Number 2003-326-C Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communication Commission's Triennial Review Order and 2003-327-C Continued Availability of Unbundled High Capacity Loops at Certain Locations and Unbundled High Capacity Transport on Certain Routes Pursuant to the Federal Communication Commission's Triennial Review Order– Verizon South Inc.'s Notice of Intent

Dear Mr. Duke:

The Federal Communications Commission's (FCC's) rules, which are in direct conflict with the 1996 Telecommunications Act, make it extremely difficult for Verizon South Inc. (Verizon) to challenge the FCC's impairment determinations in the above-referenced proceedings. In light of the significant obstacles imposed by the FCC's rules, Verizon hereby notifies the South Carolina Public Service Commission (Commission) that Verizon will not challenge the impairment determinations in South Carolina during the nine-month proceedings and, **accordingly, will not actively participate in the referenced dockets during that timeframe**. Verizon nevertheless reserves its right to challenge these determinations at a later time.

I would be most appreciative if you would bring this filing to the attention of the Commission. Should you have any questions regarding this matter, please call me.

Yours truly,

Stan Bugner

c: Parties of Record